86-129

Supreme Court, U.S.
FILED
JUL 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

in the Supreme Court of the United States

ANDRES PULIDO-ZORRILLA

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS

RONALD A. DION, ESQ.
ENTIN, SCHWARTZ, BARBAKOFF
AND SCHWARTZ
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34pp

QUESTION PRESENTED

Whether the rebuttable presumptions created by 18 U.S.C. §3142(e) regarding the denial of pre-trial release violate the defendant's Constitutional rights to bail pursuant to the Eighth Amendment to the United States Constitution and to due process pursuant to the Fifth Amendment to the United States Constitution?

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ANDRES PULIDO-ZORRILLA

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered on July 11, 1986.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit is not published and is printed in the Appendix.

JURISDICTION

Jurisdiction is herein sought pursuant to 28 U.S.C. §1254(1) and Rules of the Supreme Court, Rule 17.1(a).

STATUTES INVOLVED

18 U.S.C. §3142(e) states that:

Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the controlled substances act (21 U.S.C. §81 et seq.), the controlled substances import and export act (21 U.S.C. §951 et seq.), section 1 of the act of September 15, 1980 (21 U.S.C. §955(a) or an offense under §924(c) of Title 18 of the United States Code.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari seeks review of the opinion of the United States Court of Appeals for the Third Circuit dated July 11, 1986 denying defendant's Motion for Pre-Trial Release and For Appellate Review of Pre-Trial Detention Order.

The facts upon which the appellant seeks relief are as follows: The defendant, Andres Pulido-Zorrilla was originally arrested in California pursuant to a warrant issued by the United States District Court, District of New Jersey. At the request of the United States Attorney's Office, District of New Jersey, officials in California requested at the defendant's first appearance that pre-trial detention be ordered. Without any written findings of fact being entered by the committing Magistrate, the defendant was ordered detained without bond.

Upon the defendant's return to New Jersey, a Motion for Bond was filed pursuant to 18 U.S.C. §3142. After a hearing was held on defendant's Motion for Bail, bail was denied and pre-trial detention was ordered on May 13, 1986.

A Notice of Appeal was timely filed on May 9, 1986 seeking review of the trial court's oral pronouncement of May 2, 1986. A timely Amended Notice of Appeal was forwarded to the appellate court on May 19, 1986, seeking review of the Court's written order of May 13, 1986.

Defendant's Motion for Pre-trial Release and For Appellate Review of Pre-Trial Detention Order filed in

the United States Court of Appeals, Third Circuit, was denied on July 11, 1986. As such, the defendant is presently awaiting trial, under the order of pre-trial detention.

The order of the trial court which was affirmed by the United States Court of Appeals for the Third Circuit justified its finding of pre-trial detention exclusively upon the rebuttal of presumptions created by 18 U.S.C. §3142(e). Said order read as follows:

> This matter having been opened to the court on the application of defendant, Andres Pulido-Zorrilla (by Alvin E. Entin, Esq., and the court having heard testimony and the arguments of counsel for defendant and for the United States (Thomas Greelish, United States Attorney, by Judy G. Russell, Assistant United States Attorney), the court finds that the evidence presented by the defendant is insufficient to rebut the presumption pursuant to 18 U.S.C. §3142(e) that no condition or combination of conditions will reasonably assure both the appearance of the defendant as required in the safety of the community, and therefore,
>
> It is on this 13th day of May, 1986:
>
> ORDERED that the motion by defendant, Andres Pulido-Zorrilla to set aside the order of detention previously entered in this matter upon his initial appearance in the Central District of California and to be admitted to bail pending trial shall be and hereby is DENIED. . . .

ARGUMENT

ISSUE

THE REBUTTABLE PRESUMPTIONS CREATED BY 18 U.S.C. §3142(e) REGARDING THE DENIAL OF PRE-TRIAL RELEASE VIOLATES THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO BAIL PURSUANT TO THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND TO DUE PROCESS PURSUANT TO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

As previously noted in the Statement of the Case and Facts, defendant Andres Pulido-Zorrilla is presently being detained under pre-trial detention pursuant to 18 U.S.C. §3142(e). The trial court ruled, as affirmed by the United States Court of Appeals for the Third Circuit, that:

> This matter having been opened to the court on the application of defendant, Andres Pulido-Zorrilla (by Alvin E. Entin, Esq., and the court having heard testimony and the arguments of counsel for defendant and for the United States (Thomas W. Greelish, United States Attorney, by Judy G. Russell, Assistant United States Attorney), the court finds that the evidence presented by the defendant is insufficient to rebut the presumption pursuant to 18 U.S.C. §3142(e) that no condition or combination of conditions will reasonably assure both the

appearance of the defendant as required in the safety of the community, and therefore,

It is on this 13th day of May, 1986:

ORDERED that the motion by defendant, Andres Pulido-Zorrilla to set aside the order of detention previous'y entered in this matter upon his initial appearance in the Central District of California and to be admitted to bail pending trial shall be and hereby is DENIED. . . .

In the defendant's Motion for Pre-Trial Release before the United States District Court, District of New Jersey and in defendant's Motion for Pre-Trial Release and for Appellate Review of Pre-Trial Detention Order in the United States Court of Appeals for the Third Circuit, the defendant did challenge the constitutionality of the rebuttable presumption created by 18 U.S.C. §3142(e).

The defendant would respectfully submit that the issue regarding the constitutionality of said rebuttable presumption is ripe for review by this Court due to the existence of a conflict between the circuits.

Said rebuttable presumption created under 18 U.S.C. §3142(e) has been declared unconstitutional by the Second Circuit Court of Appeals in *United States v. Melendes-Carrion*, ____ F.2d ____ (2nd Cir. 1986); Case no. 85-1431. Said provision has been found to be constitutional in the case at bar by the United States Court of Appeals for the Third Circuit by affirming said pre-trial detention, and has further found said statute to be constitutional

in *United States v. Perry*, ____ F.2d ____ (3rd Cir. 1986); Case No. 85-3680.

Based upon said conflict between the circuits as to the constitutionality of the rebuttable presumption created in 18 U.S.C. §3142(e), the defendant would respectfully submit that certiorari review by this Court is appropriate.

CONCLUSION

For the above reasons and authorities cited herein, the Petitioner, Andres Pulido-Zorrilla, respectfully requests this Honorable Court to grant certiorari jurisdiction in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, and to the Office of the United States Attorney, 970 Broad Street, Room 502, Newark, New Jersey, 07102, this day of July, 1986.

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Appendix

[FILED MAY 13 1986]

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

HONORABLE JOHN F. GERRY, U.S.D.J.

Criminal No. 86-90

UNITED STATES OF AMERICA

vs.

ANDRES PULIDO-ZORRILLA

ORDER AS TO BAIL MOTION

THIS MATTER having been opened to the Court on the application of defendant Andres Pulido-Zorrilla (by Alvin E. Entin, Esq.), and the Court having heard testimony and the arguments of counsel for defendant and for the United States (Thomas W. Greelish, United States Attorney, by Judy G. Russell, Assistant U.S. Attorney), the Court finds that the evidence presented by the defendant is insufficient to rebut the presumption pursuant to 18 U.S.C. § 3142(e) that no condition or combination of conditions will reasonably assure both the appearance of the defendant as required and the safety of the community, and therefore

IT IS on this 13th day of May, 1986:

ORDERED that the motion by defendant Andres Pulido-Zorrilla to set aside the Order of Detention

previously entered in this matter upon his initial appearance in the Central District of California and to be admitted to bail pending trial shall be and hereby is DENIED; and it is further

ORDERED that defendant's motion to compel the United States Marshal Service to house him pending trial in a federal facility in Miami, Florida, shall be and hereby is DENIED without prejudice to its renewal should counsel reach a voluntary agreement with the United States Marshal Service and United States Bureau of Prisons.

/s/ John F. Gerry

HONORABLE JOHN F. GERRY
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

INDICTMENT NO. 86-00090

ANDRES PULIDO-ZORILLA,
Defendant/Appellant

vs.

UNITED STATES OF AMERICA,
Plaintiff/Appellee

NOTICE OF APPEAL

COMES NOW, the Defendant/Appellant, by and through his undersigned counsel, and files this Notice of Appeal, appealing to the United States Court of Appeals for the Third Circuit the denial of the Motion for Bond in this cause as orally pronounced On May 2, 1986.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to the Judy Russell, Esq., Office of the United States Attorney, 970 Broad Street, Room 502, Newark, New Jersey, 07102, this 9th day of May, 1986.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
HONORABLE JOHN F. GERRY, U.S.D.J
CRIMINAL NO. 86-90

ANDRES PULIDO-ZORRILLA,
Defendant/Appellant,

vs.

UNITED STATES OF AMERICA,
Plaintiff/Appellee

AMENDED NOTICE OF APPEAL

COMES NOW, the Defendant/Appellant, ANDRES PULIDO-ZORRILLA, and files this Amended Notice of Appeal, seeking appellate review of the lower court's order denying pre-trial bond and ordering pre-trial detention (order as to bail motion). Said order is dated May 13, 1986.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Thomas W. Greelish, Assistant United States Attorney, District of New Jersey, 970 Broad Street, Room 502, 07102, this 19th day of May, 1986.

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IN THE UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

CASE NO.: 86-5326

Trial No.: 86-00090-01

UNITED STATES OF AMERICA
Plaintiff/Appellee

vs.

ANDRES PULIDO-ZORRILLA
Defendant/Appellant

MOTION FOR PRE-TRIAL RELEASE AND FOR APPELLATE REVIEW OF PRE-TRIAL DETENTION ORDER

COMES NOW the Defendant/appellant, Andres Pulido-Zorrilla, by and through his undersigned counsel, files this Motion for Pre-trial Release and for Appellate Review of Pre-trial Detention Order, and would allege in furtherance thereof as follows:

1. The Defendant, Andres Pulido-Zorrilla was originally arrested in California pursuant to a warrant issued by the United States District Court, District of New Jersey.

2. At the request of the United States Attorney's Office, District of New Jersey, officials in California requested at the Defendant's first appearance that pre-trial detention be ordered.

3. Without any written findings of fact being entered by the committing Magistrate, the Defendant was ordered detained without bond.

4. Upon the Defendant's return to New Jersey, undersigned counsel filed a motion for bond pursuant to 18 U.S.C. Sec. 3142.

5. After a hearing was held on Defendant's motion for bail, bail was denied and pre-trial detention was ordered on May 13, 1986.

6. A notice of appeal was timely filed on May 9, 1986 seeking review of the trial court's oral pronouncement of May 2, 1986. A timely amended notice of appeal was forwarded to the court May 19, 1986 seeking review of the court's written order of May 13, 1986.

7. The Defendant is presently awaiting trial, being charged by indictment with violating 21 U.S.C. Sec. 848 and 846 relating to his alleged involvement in cocaine.

8. At the hearing on Defendant's motion and in its written order, the trial court relied upon the rebuttable presumptions created by 18 U.S.C. Sec. 3142 (e).

9. 18 U.S.C. Sec. 3142 (e) states that:

> Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed an offense for which a

maximum term of imprisonment of 10 years or more is prescribed in the Controlled Substances Act (21 U.S.C. Sec. 81 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. Sec. 951 et seq.), Sec. 1 of the Act of September 15, 1980 (21 U.S.C. 955a), or an offense under Sec. 924 (c) of Title 18 of the United States Code.

10. It is respectfully submitted that said rebuttable presumption has been declared unconstitutional in *United States vs. Melendes-Carrion*, ____ F.2d ____ (2nd Cir., 1986); Case No. 85-1431.

11. The order entered below denying pre-trial release was expressly and exclusively based upon this statutory rebuttable presumption, thus necessitating a *de novo* consideration of pre-trial release without reference to the unconstitutional presumption.

12. It is further respectfully submitted that the trial court failed to comply with the requirements of 18 U.S.C. Sec. 3142 (i).

13. 18 U.S.C. 3142 (i) mandates that the Judicial officer shall "include written findings of fact and a written statement of the reasons for detention." The order entered below includes no findings of fact.

14. The order entered below regarding the denial of pre-trial release states as follows:

> This matter having been opened to the court on the application of Defendant, Andres Pulido-Zorrilla (by Alvin E. Entin, Esq.), and the court

> having heard testimony and the arguments of counsel for Defendant and for the United States (Thomas Greelish, United States Attorney, by Judy G. Russell, Assistant U.S. Attorney), the court finds that the evidence presented by the Defendant is insufficient to rebut the presumption pursuant to 18 U.S.C. Sec. 3142 (e) that no condition or combination of conditions will reasonably assure both the appearance of the Defendant as required and the safety of the community, and therefore,
>
> It is on this 13th day of May, 1986:
>
> ORDERED that the motion by Defendant, Andres Pulido-Zorrilla to set aside the Order of Detention previously entered in this matter upon his initial appearance in the Central District of California and to be admitted to bail pending trial shall be and hereby is DENIED. . . .

15. The importance of written findings of fact as statutorily required cannot be over emphasized, especially in light of the rebuttable presumption, if the same be constitutional.

> Since the presumption is but one factor among many, its continued consideration by the magistrate does not impose a burden of persuasion upon the defendant. And, since Congress seeks only consideration of the general drug offender/flight problem, the magistrate or judge may still conclude that what is true in general is not true in the particular case before him. He is free to do so, and to release the

> defendant, as long as the defendant has presented some evidence and the magistrate or judge has evaulated all of the evidence with Congress's view of the general problem in mind. It is worth noting that the Act requires that all detention orders "include written findings of fact and a written statement of the reasons for the detention." Sec. 3142 (i)(1) Thus, the defendant is protected from a weighing of factors that is arbitrary, or not in keeping with the Act.

United States v. Jessup, 757 F.2d 378 (1st Cir. 1985).

16. In addition to failing to include written findings of fact and a written statement of the reasons for the detention, it is respectfully submitted that the trial court improperly placed the burden of proof upon the Defendant.

17. The trial court ruled that "the evidence presented by the Defendant is insufficient to rebut the presumption. . . ." At no time did the trial court state that the government had met its burden of proof.

18. It is generally recognized that, "Congress did not intend to shift the burden of persuasion to the Defendant but intended to impose only a burden of production." *United Statea v. Jessup, supra.* and *United States v. Chimurenga*, 760 F.2d 400 (2nd Cir. 1985).

19. Since the trial court merely stated that the Defendant's evidence was insufficient to rebut the presumption, it appears from the order that the trial court improperly imposed upon the Defendant both the burden of production and persuasion. Once the Defendant

presented any evidence on his behalf in support of the motion for bond, it is necessary for the trial court to then make a determination as to whether the government has met its burden of proof necessitating pre-trial detention, taking into account the Defendant's evidence, the government's evidence and the statutory presumption. *Jessup* and *Chimurenga.*

20. For example, in the case of *United States v. Contreras,* 776 F.2d 51 (2nd Cir. 1985), the court found proper pre-trial detention based upon the following order:

> After considering the evidence presented by each side, the District judge concluded that appellant should be detained because he failed to rebut the Sec. 3142 (e) presumption and because the government had proved by a preponderance of the evidence that no condition or combination of conditions would reasonably assure appellant's appearance at trial.

It is this determination that the government met its burden of proof that is missing from the trial court's order of pre-trial detention entered below.

21. At a bare minimum, the Defendant would respectfully submit that he is entitled to a new pre-trial detention determination with the burden of proof being properly placed upon the government.

22. In addition, the Defendant would respectfully request this Honorable Court "independently determine" his request for pre-trial release. Such an independent determination is appropriate according to the prior

precedent of this circuit. *United States v. Coleman* 777 F.2d 888 (3rd Cir. 1985) and *United States v. Strong* 775 F.2d 504 (3rd Cir. 1985).

23. At the hearing below, the United States Government relied exclusively upon the statutory presumption, presenting no evidence or testimony upon the issues to be decided by the court.

24. The Defendant, Andres Pulido-Zorrilla testified and presented corroborating evidence that he has lived in the United States, off and on, since high school, that at the time of his arrest he resided in Benedict Canyon, California, that for the last five years he has been gainfully employed as a free-lance wholsesale flower distributor and as an importer and distributor of precious gem stones. The Defendant has never been arrested nor convicted of any crimes, other than minor traffic infractions. In addition, the Defendant's mother owns a condominium apartment in Key Biscayne, Miami, Florida. The government presented no evidence or testimony to negate the presentation of the Defendant.

25. The Defendant further argued at the pre-trial hearing that the government's case against the Defendant was weak since the entire case is based upon uncorroborated testimony. In fact, the government's sole evidence regarding the Defendant's direct involvement with narcotics and participation in a continuing criminal enterprise was two alleged hand-to-hand sales of cocaine (10 ounces and 1 pound) to undercover officers. The government does not deny that no corboration by surveilance, physical evidence, or laboratory analysis exists, and that the Defendant was never previously arrested for these two year incidences.

26. In evaluating the propriety of pre-trial release, this court should consider the case of *United States v. Dominguez*, 783 F.2d 702 (7th Cir. 1986).

27. In *United States.v. Dominguez, supra.* the court established a standard by which the Defendant must "rebut" the statutory presumptions.

> Any evidence favorable to the Defendant that comes within a category listed in Sec. 3142 (g) can affect the operation of one or both of the presumptions, including evidence of their marital, family and employment status, ties to and role in the community, clean criminal record and other types of evidence encompassed in Sec. 3142 (g)(3). . . .
>
> (These presumptions) are "rebutted" when the defendant meets a "burden of production" by coming forward with some evidence that he will not flee or endanger the community if released. Once this burden of production is met, the presumption is "rebutted" in the sense that word was used in *Jessup*. Use of that word in that context is somewhat misleading because the rebutted presumption is not erased. Instead it remains in the case as an evidentiary finding militating against release, to be weighed along with other evidence relevant to factors listed in Sec. 3142 (g) . . . . The burden of persuasion remains with the government once the burden of production is met. The burden of production is not a heavy one to meet. . . .

28. In *United States v. Dominguez, supra* the trial court found proper grounds for pre-trial release, not withstanding the statutory presumptions, based upon the Defendant's residence in the United States for five years, his lawful employment, and the lack of any criminal record in the United States. The Defendant would respectfully submit that these identical factors should be considered in this request for pretrial release and that his testimony and "evidence of economic and social stability, coupled with the absence of any relevant criminal record, at least suggests that Defendants would be less likely to continue to engage in criminal acitivity while on pre-trial release".

29. Thus the Defendant would respectfully submit that the trial court's order of May 13, 1986 denying pre-trial release and mandating pre-trial detention is improper for the following reasons: (1) The statutory presumption created by 18 U.S.C. Sec. 3142 (e) is unconstitutional; (2) The trial court failed to comply with the requirements of 18 U.S.C. Sec. 3142 (i) in that the order failed to "include written findings of fact and a written statement of the reasons for the detention"; (3) The trial court improperly placed the burden of persuasion upon the Defendant; (4) the Defendant presented testimony and evidence to rebut the statutory presumption; and (5) The government failed to meet its burden of proof that the Defendant should not be released upon pre-trial bail.

WHEREFORE the Defendant, Andres Pulido-Zorrilla respectfully requests this Honorable Court to reverse the order of pre-trial detention entered below and to grant to the Defendant a reasonable pre-trial bail

consistent with the Sixth Amendment to the United States Constitution.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Judy Russell, Esq., Office of the United States Attorney, 970 Broad Street, Room 502, Newark, New Jersey, 07102, this 30th day of May, 1986.

/s/ Ronald A. Dion
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

June 4, 1986

No. 86-5326

UNITED STATES OF AMERICA

vs.

PULIDO-ZORRILLA, ANDRES
Andres Pulido-Zorrilla, Appellant

(N.J. D.C. Crim. 86-00090-01)

Present: ALDISERT, Chief Judge, and WEIS and SLOVITER, Circuit Judges.

1. Appellant's motion for pre-trial release on bail and for this Court to reverse the District Court's pre-trial detention order of May 13, 1986,

in the above-entitled case(s).

Respectfully,

s/ [illegible]
Deputy Clerk 7-1092

enc.
dt

The foregoing Motions are denied

By the Court,

/s/ Weis

Judge

Dated: July 11, 1986

dt/cc: (RAD, AEE)
DJF